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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-4864

DENNIS GARY MONGER,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

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IN THE

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October Term, 1971

No. _____

DENNIS GARY MONGER,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

Dennis Gary Monger, Petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida, entered in this case on July 6, 1971.

OPINIONS BELOW

Petitioner Monger was tried and convicted on November 3, 1970, in the Court of Record in and for Escambia County, Florida, on two counts of violating Section 847.011, Florida Statutes by unlawfully selling obscene magazines. Adjudication of guilt and further sentencing was deferred

until January 8, 1971, for investigation by the Florida Parole Commission. On January 8, 1971, his Honor, Judge Beall, inquired of counsel for Petitioner whether, if a fine were imposed, the same parties who paid for the defense would pay his fine. Counsel for Petitioner expressed to the Court that they probably would. His Honor then stated that rather than let the Petitioner, who the Court stated had a heart condition, languish in jail until they make up their minds, the Court would defer imposition of sentence until Tuesday. The Court then indicated that he would impose a total of Two Thousand Dollars ($2,000.00) in fines upon the Petitioner plus One Dollar ($1.00) in costs or one day as required by law. The Court then deferred imposition of the fine until the following Tuesday morning. In response to an inquiry by Petitioner's counsel as to what the Petitioner's obligation would be on that date, the Court stated that Petitioner would have to be present Tuesday morning unless the money was paid in the meantime because he didn't want Petitioner to trust his liberty to people low enough to promulgate the literature involved in the case. The Court, again in response to inquiry by Petitioner's attorney, stated that either the fine would be paid Tuesday morning or the Court would have to sentence or "do something with this man."

On January 12, 1971, his Honor, Judge Beall, adjudged Petitioner guilty on each count and imposed a sentence of a One Thousand Dollar ($1,000.00) fine or, upon default, six (6) months imprisonment on each count, to run consecutively, and ordered Petitioner to pay court costs of One Hundred Fifty Dollars ($150.00) or thirty (30) days to run consecutively.

The Court was then advised by Petitioner's counsel that a notice of appeal had been filed along with a motion for

supersedeas. Stay of execution of the sentence was denied and supersedeas bond was fixed at Five Thousand Dollars ($5,000.00). Petitioner's counsel asked that the bond be set at Two Thousand Five Hundred Dollars ($2,500.00) whereupon the trial court sentenced Petitioner to one (1) year in jail or each count in addition to the sentence already announced. The trial court then had his bailiff escort Petitioner's counsel from the court room. Subsequently, the trial court entered an order on January 18, 1971, *nunc pro tunc* January 12, 1971, which rescinded the additional sentence, leaving only the fines or six (6) months in jail, plus costs of One Hundred Fifty Dollars ($150.00) or thirty (30) days, remaining.

A timely appeal to the District Court of Appeal, First District, State of Florida, was entered. That Court, on April 7, 1971, determined that its jurisdiction had been improvidently invoked and ordered the transfer of the cause to the Supreme Court of Florida. On May 11, 1971, Petitioner's counsel moved that this matter be consolidated for argument with another cause then pending in the Florida Supreme Court. Said motion was denied on May 24, 1971. On May 10. 1971, the Attorney General of the State of Florida moved to dismiss the appeal and on June 9, 1971, the Supreme Court of Florida, by a vote of four to three (4-3), with one (1) dissenting opinion, entered an opinion which stated "Appellee's motion to dismiss is granted and it is ordered that the appeal be and the same is hereby dismissed." A timely petition for rehearing was filed and was denied on July 6, 1971. This Petition for a Writ of Certiorari is filed within ninety (90) days of said date.

JURISDICTION

The order of the Supreme Court of Florida dismissing the appeal was filed on June 9, 1971. The denial of the petition

for rehearing was dated July 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

ISSUES PRESENTED FOR REVIEW

1. Whether the dismissal by a state's highest court of an appeal in a criminal case presenting substantial questions under the Constitution of the United States on the sole ground that the notice of appeal was filed prior to the judgment and sentence being reduced to writing and placed in the minute or judgment book although they had been pronounced in open court and reflected in the minutes, thereby denying Petitioner review of the federal questions presented, denies Petitioner due process of law when the obscenity conviction in the trial court could not have been based on adequate and independent nonfederal grounds and the State was in no way prejudiced by said filing.

2. Whether Section 847.011, Florida Statutes violates the *First, Fifth, and Fourteenth Amendments* to the *Constitution of the United States.*

3. Whether, consistent with the *First, Fifth, and Fourteenth Amendments* to the *Constitution of the United States,* a state can base an obscenity conviction for selling "girlie" magazines on the testimony as to the three elements making up the test of obscenity of the Police Chief of the county in which the case is tried, on the ground that by virtue of his position alone, he is qualified to give an expert opinion on said elements.

4. Whether the magazines upon which the conviction is based and which were disseminated under circumstances under which the sensibilities of unwilling individuals were not

intruded upon, there was no dissemination to juveniles and no "pandering" in the *Ginzburg* sense, are obscene in the Constitutional sense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States;* and the provisions of *Section 847.011* of the *Florida Statutes* are set forth in Appendix "A" attached hereto.

STATEMENT OF THE CASE

Petitioner Dennis Gary Monger was employed at the Arcade Newstand; which sold "girlie" magazines in a separate, adults-only section of the premises.

On April 1, 1971, he was charged with two counts of violating the Florida obscenity Statute, *Section 847.011, Florida Statutes.* A Motion to Dismiss the information was filed and overruled, and the case was tried before a jury on November 2 and 3, 1970. The jury found Petitioner guilty on both counts.

There was no evidence from any competent witness bearing upon the appeal to the prurient interest of the materials. There was no evidence from any competent witness that the magazines went substantially beyond the customary limits of candor in the national community in the depiction of nudity and sex. There was no evidence from any competent witness that the materials were utterly without redeeming social value.

Two witnesses testified as to these matters for the State of Florida, over objection. Both were police officers in Escambia County, Florida. Officer Griffin's testimony related to the standards in Escambia County, Florida. Police Chief Caldwell's testimony purported to relate to national standards. Upon objection to his being competent to express opinions as to the elements of obscenity as they related to the publications alleged to be obscene, the trial court ruled that "the chief of police of a city of approximately 175,000 people and county of over 200,000 people is certainly sufficient expert to testify on the subject as to community standards or national standards as to what is obscene in a case like this."

There was no evidence that Petitioner was even familiar with the contents of the magazines in evidence and there was evidence that he was not.

There was testimony that both magazines did not affront the contemporary national community standards as to representation of nudity or sex. There was testimony that the publications did not appeal to a prurient interest and that they had social value.

Motions for a directed verdict of acquittal were made and overruled at the close of the State's case and at the conclusion of the trial.

HOW FEDERAL QUESTIONS ARE PRESENTED

A criminal information was filed against Petitioner on April 1, 1970. A copy is contained herein as Appendix "N".

On behalf of Petitioner, a Motion to Dismiss the Information was filed on October 29, 1970, which set forth as grounds that Section 847.011, Florida Statute, is unconstitutional and had been declared to be so in *Meyer v. Austin*, which case is now before the United States Supreme Court. Said case is styled *Austin v. Meyer* and is No. 70-35. A copy of said Motion is contained herein as Appendix B. The Motion to Dismiss Information was denied on October 30, 1970, and a copy of the order denying said Motion is contained herein as Appendix C.

At the conclusion of the State's case, Petitioner moved for judgment of acquittal for two (2) reasons. As to the magazine "Body Shop," the grounds were that the opinions rendered by both of the State's witnesses were not based on a reading of the material as a whole. Secondly, as to both magazines, on the ground that the State failed to provide or introduce sufficient evidence to go to a jury which would sustain a verdict of guilty. Said motions were denied.

At the conclusion of the trial, Petitioner moved for a judgment of acquittal on the grounds that:

1. There had been no showing that Petitioner knew the contents of the magazines at the time there was a sale and there was no evidence of facts or circumstances which would lead a jury to believe that he had knowledge that he was selling a magazine that had not previously been declared obscene.

2. The publications in evidence are not obscene.

3. There was no evidence these publications are obscene because:

a. The police officers who testified, testified that they had not read the printed material or, if they had, they scanned it; and

b. They testified that the other magazine does not exceed the customary limits of candor with reference to the national community standards, that they have redeeming social value, and that they do not appeal to the prurient interest of any person.

The Motion was denied.

The circumstances under which the Notice of Appeal was filed are set out in the Opinions Below portion of this petition. The Notice of Criminal Appeal, Motion for Supersedeas, the Judgment and Sentence of the trial court, the Assignments of Error, and the *Nunc Pro Tunc* Order of the trial court are all contained herein as Appendices D, E, F, G, and H.

The Assignments of Error were as follows:

1. The court erred at trial on November 2, 1970, and prior to trial by declaring that §847.011, Florida Statutes, after thorough briefing and argument, was constitutional.

2. The court erred in its order denying the Defendant's motion to dismiss the information on the grounds that §847.011, Florida Statutes, was unconstitutional.

3. That the verdict and judgment is contrary to the law.

4. That the verdict and judgment is contrary to the evidence.

5. That the verdict and judgment is contrary to the law and the evidence.

6. The court erred in denying the Defendant's motion for a directed verdict of acquittal.

7. The court erred in permitting the case to go to the jury after it was clear that there was no evidence in a proper predicate laid of contemporary national community standards, prurient appeal to the average adult reader, and any redeeming social value.

8. The court failed to make a determination of obscenity on its own, as is constitutionally required, before it sent the case to the jury. The jury unjustly presumed the material obscene in the absence of the court's not passing on same.

9. The court erred in refusing to instruct the jury on a verbal description of material described by the United States Supreme Court in the language of the instruction to be not obscene.

10. The court did not require evidence on the element of scienter or knowledge on the part of the Defendant that the published material was obscene. The only evidence before the court was that the Defendant had no knowledge of obscenity of the particular magazine involved.

11. No standard was provided at trial and unqualified witnesses were permitted to give personal opinions as to the obscenity vel non thereby unduly influencing to the prejudice of the Defendant the jury who had no standard by which to measure.

12. It is constitutionally impermissible for a jury in a criminal trial to make a determination of obscenity and guilt of the accused, where there has been no prior judicially superintended adversary civil hearing declaring the material to be obscene.

13. The court erred by refusing to permit the introduction into evidence of five publications that were held to be not obscene by the United States Supreme Court for purposes of permitting the jury to compare the allegedly obscene with the known non-obscene.

The order transferring the case to the Supreme Court of Florida is contained herein as Appendix I. The Motion to Dismiss the Appeal, dated May 10, 1971, is contained herein as Appendix J. The opinion of the Supreme Court of Florida dismissing the appeal and the dissenting opinion are contained herein as Appendix K.

The petition for rehearing and order denying it are contained herein as Appendices L and M. The order denying a rehearing is dated July 6, 1971.

REASONS FOR GRANTING THE WRIT

1. The Dismissal of an Appeal from a Criminal Conviction for selling obscene materials on the sole ground that, technically, the Notice of Appeal was filed prior to the judgment and sentence, does not comport with civilized notions of justice and is fundamentally unfair and violative of the Due Process Clause where there can be no adequate and independent base for the conviction because

Obscenity *Vel Non* is a question of constitutional law and where there is no claim of prejudice to any legitimate interest of the State.

This Court has made it clear that a State's refusal to hear an appeal is reviewable by it where the refusal itself raises a federal constitutional issue.

In *Burns v. Ohio*, 360 U.S. 252, 79 S. Ct. 1164, 3 L. Ed. 2d 1209 (1959), the Supreme Court quoted a Writ of Certiorari for an indigent prisoner whose appeal to the Supreme Court of Ohio had been refused because it was not accompanied by a filing fee. The Court, in an opinion by Chief Justice Warren for six members of the Court, treated the letter of the Clerk of the Ohio Supreme Court refusing the appeal as a final judgment of the State's highest court within the meaning of *Title 28, U.S.C. §1257*, which requires a final judgment as a prerequisite of review by the United States Supreme Court.

Due process of law should condemn an arbitrary withholding of the right to appeal when it is permitted to others whose situation differs only in a respect which cannot be constitutionally recognized. See *Cochran v. Kansas*, 316 U.S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453; *Dowd v. Cook*, 340 U.S. 206, 71 S. Ct. 262, 95 L. Ed. 215.

There cannot be, for constitutional reasons, any distinction between the filing of a notice of appeal as was done here and the filing of a notice of appeal after the words had been physically put on the records.

In the last term of this Court, it held that the Due Process Clause prohibits the denial of access to the Courts for

purposes of obtaining a divorce on the sole ground of inability to pay. *Boddie v. Connecticut*, 401 U.S. 371 (1971). This decision was based on:

> "the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship . . . " *Supra* at 374.

In making its decision, the Court compared the plight of the civil litigants involved in that case with those defendants:

> "Thus, although they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture, we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.
>
> *Boddie v. Connecticut, supra* at 376, 377.

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "'[w]herever one

is assailed in his person or his property, there he may defend," *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876) See *Baldwin v. Hale*, 1 Wall. 223 (1864); *Hovey v. Elliott*, 167 U.S. 409 (1897).

Boddie v. Connecticut, supra at 377.

Mr. Justice Harlan then went on to say, in regard to due process:

"* * * the State owes to each individual that process which, in light of the values of a free society, can be characterized as due."

Boddie v. Connecticut, supra at 380.

Furthermore, the Court summed up the Concepts involved in due process as follows:

"In the case at bar, Petitioner will have no hearing on the substantial federal questions, decided adversely to him, raised by his conviction for selling obscene magazines, unless the dismissal of his appeal is treated as a final judgment. Not to do so would sustain the State of Florida's denial to Petitioner of his right to appeal where there is not sufficient countervailing justification for the State's action.

Boddie v. Connecticut, supra, at 377.

2. The Statute under which Petitioner was convicted has been held to be unconstitutional by a Three-Judge Federal Court and that decision is presently before this Court for review in *Austin v. Meyer*, No. 70-35.

This Court has before it for review the case of *Austin v. Meyer*, No. 79-35, which is a direct appeal from a decision of a three-judge court, holding a state statute unconstitutional. That state statute is the same statute under which Petitioner

was convicted and it is submitted that an affirmance in that case would control in Petitioner's case.

By hearing this case, the Court would avoid possible litigation elsewhere by Petitioner after an affirmance or, worse yet, a complete denial of his opportunity to secure a reversal if he is unable to proceed by *habeas corpus* because forced to pay a fine in order to avoid imprisonment.

3. The Materials are not Obscene as a matter of Constitutional Law.

The United States Supreme Court in *Roth v. U.S., 354 U.S. 476* (1957) stated:

> "...the question of whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive kind."

The New York Court of Appeals in *People v. Richmond County News, 9 N.Y. 2d 578, 216 N.Y.S. 2d 360, 175 N.E. 2d 681* (1962) stated:

> "...if an Appellate Court were to rely upon and be bound by the opinion of the trier of facts as to the obscenity of a publication it would be abdicating its role as an arbiter of constitutional issues."

The Supreme Court of the State of California in *Zeitlin v. Arnebergh, 69 C. 2d 901, 31 Cal. Rptr. 800, 383 P.2d 152* (1963) stated:

> "...They raise issues, not of ascertainment of historical fact, but the definition of statutory proscription and constitutional protection; *the court*

itself must determine the law of the case for the sake of consistent interpretation of the statute and uniform determination of whether particular matter is obscene. (59 C. 2d at 908, 909) (Emphasis supplied).

The opinion of the Supreme Court in *Jacobellis v. Ohio, 378 U.S. 184* in discussing the issue of fact versus law judgment stated:

"...we are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence.' The suggestion is appealing, since it would lift from our shoulders a difficult, recurring and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law."

Kingsley Int'l. Pictures Corp. v. Regents, 360 U.S. 684, 708, 3 L. 3d 2d 1512, 1527, 79 S. Ct. 1362 (separate opinion):

"It is sometimes said that this Court should shun considering the particularities of individual cases in this difficult field lest the Court become a final board of censorship. But I cannot understand why it should be thought that the process of constitutional judgment in this realm somehow stands apart from

that involved in other fields, particularly those presenting questions of due process. . . . "

Lockhart and McClure, Censorship of Obscenity: *The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 116* (1960):

> "This obligation—to reach an independent judgment in applying constitutional standards and criteria to constitutional issues that may be cast by lower courts in the form of determinations of fact—appears fully applicable to findings of obscenity by juries, trial courts and administrative agencies. The Supreme Court is subject to that obligation, as is every court before which the constitutional issue is raised."

U.S. v. One Obscene Book entitled Married Love, 48 F.2d 821 (1931):

> ". . . this court must determine, as a matter of law in the first instance, whether the book alleged to be obscene falls in any sense within the definition of that word."

U.S.A. v. A Motion Picture Film entitled, "I Am Curious, Yellow," 404 F.2d 196 (CA-2, 1968):

> "However, in our view obscenity *vel non* is not an issue of fact with respect to which the jury's finding has its usual conclusive effect. It is rather an issue of constitutional law that must eventually be decided by the Court . . . "

U.S.A. v. 35mm Motion Picture Film entitled "Language of Love," CA-2 1970, 432 F.2d 705; we read the following:

> "(2) At the outset we confront the fact that our judgment differs from that of the jury on questions

which were put to them specifically and on which they rendered unanimous verdicts. What weight should the jury's verdict carry? Who is to decide that a work is of such quality as to be ineligible for constitutional protection? These questions have been the subject of extended consideration by the Justices of the Supreme Court and at least at the present time have been resolved although not without dissent. Mr. Justice Harlan in *Roth* said:

> 'On this basis the constitutional question before us simply becomes, as the Court says, whether 'obscenity,' as an abstraction, is protected by the First Amendment and the Fourteenth Amendment, and the question whether a particular book may be suppressed becomes a mere matter of classification of 'fact', to be entrusted to a fact-finder and insulated from independent constitutional judgment. But surely the problem cannot be solved in such a generalized fashion. Every communication has an individuality and 'value' of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for itself whether the attacked expression is suppressable within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.
>
> 'I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as 'obscene', for, if 'obscenity'

> is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind. Many juries might find that Joyce's 'Ulysses' or Bocaccio's 'Decameron' was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are 'utterly without redeeming social importance.' 354 U.S. 476 at 497-498, 77 S. Ct. 1304, at 1315-1316, 1 L. Ed. 2d 1498.

"In *Jacobellis*, the Supreme Court clearly accepted the responsibility of being the ultimate arbiter, Mr. Justice Brennan writing:

> 'We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence.' The suggestion is appealing, since it would lift from our shoulders a difficult, recurring and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth v. United States*, supra, *354 U.S. at 497-98*, (77 S. Ct. 1304), (separate opinion).

> Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id. at 498 (77 S. Ct. 1418); see *Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 82 S. Ct. 1432, 8 L. Ed. 2d 639* (opinion of Harlan, J.). *378 U.S. 184 at 187-188, 84 S. Ct. 1676 at 1678, 12 L. Ed. 2d 793.'*

"Dissenting, Chief Justice Warren thought that the test on review should be to apply a 'sufficient evidence' test to the fact findings of appropriate State and Federal courts as *** 'the only reasonable way I can see to obviate the necessity of this Court's sitting as the Super Censor of all the obscenity purveyed through the Nation:'

"In 'I Am Curious (Yellow)' this court did not allow a jury's verdict to remain as the controlling factor in its reversal. In his opinion, concurring with Judge Hays, Judge Friendly wrote concerning Chief Judge Lumbard's dissenting opinion upholding the role of the jury and the finality of their verdict:

> 'This has its attractiveness, if only in relieving busy appellate courts from having to spend so much time on cases like this. See *O'Meara & Shaffer, Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio, 40 Notre Dame Lawyer 1* (1964). But I find little support for his thesis in the many opinions of members of the Supreme Court during the last decade. Even Chief Justice Warren's more moderate statement in dissent in *Jacobellis v. Ohio, supra, 378 U.S. at 202-203, 84 S. Ct. at 1686*, that he would subject the judgments of lower courts 'to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could

be made,' was concurred in solely by Mr. Justice Clark. Squarely to the contrary are Mr. Justice Harlan's observations in dissent in *Roth v. United States, supra, 354 U.S. at 497-498, 77 S. Ct. 1304,* and in speaking for himself and Mr. Justice Stewart in *Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 822 S. Ct. 1432, 8 L. Ed. 2d 639* (1962), and Mr. Justice Brennan's expressions for himself and Mr. Justice Goldberg, joined in this respect by Mr. Justice Harlan, in *Jacobellis v. Ohio, supra, 378 U.S. at 189-190, 203, 84 S. Ct. 1676.* Placing the decisional task upon judges is a natural consequence of the emphasis on 'a national standard of decency.' *Manual Enterprises v. Day, supra, 370 U.S. at 488, 82 S. Ct. 1432* (Harlan, Jr.), and *Jacobellis v. Ohio, supra, 378 U.S. at 194-195, 84 S. Ct. 1676* (Brennan, J.), a principle peculiarly applicable to a federal statute governing the exclusion of a film from the entire United States. Likewise, the jury has no special competence on the issue of 'redeeming social value', 404 F. 2d at 201-202. Also see id. at 199.'

"If the Supreme Court chooses not to abdicate its responsibility in deciding obscenity as a matter of fact, neither should this court, although it be only an intermediate waystation in the appellate review process. Thus, the primary burden of rendering the 'constitutional judgment' required in obscenity cases as the law now stands rests upon this court, and the verdict of the jury can only be an advisory opinion at best. Thus we proceed to the constitutional issue which is ours for decision in the case at bar."

Prior to 1948 the Supreme Court of the United States never heard a challenge to the constitutionality of laws suppressing the distribution, dissemination, or receiving of

conceivably obscene material. In 1921 *Commonweath v. Holmes, 17 Mass. 336,* (1821), the lower courts sustained a conviction under stand and federal anti-obscenity statutes without considering the constitutional implications of such regulations. The United States Supreme Court heard numerous appeals from obscenity convictions but the *First Amendment* issue was never raised by any of the parties or discussed by the Court.

In 1947 the State of New York Court of Appeals affirmed a *nisi prius* ruling that Edmund Wilson's *Memoirs of Hecate County* was obscene, noting in a unanimous *per curiam* opinion that:

> "The conviction aforesaid did not violate freedom of speech guaranteed by the First and Fourteenth Amendments of the Constitution of the United States."

See *People v. Doubleday and Company, 297 New York 687* (1947).

When this appeal presenting the *First Amendment* question for the first time reached the Supreme Court the following year, Mr. Justice Frankfurter, a personal friend of Edmund Wilson, did not sit. The remaining eight Judges split evenly, following tradition, the lower court's disposition was affirmed without opinion. See *Doubleday and Company v. New York, 355 U.S. 848* (1948). However, for eight years thereafter, the Court remained silent on the obscenity issue. Critics of the Court, notably Professors Lockhart and McClure and the distinguished lower court judges, expressed concern during this time about the unresolved problem of recognizing

obscenity regulations with the accepted *First Amendment* theory on the grounds in which these may be suppressed.

In 1956 the Supreme Court decided *Butler v. Michigan, 352 U.S. 380* (1965), its first important obscenity case. *Butler* was a test of a Michigan statute making it a crime to:

> "... publish materials tending to incite minors to violence or depraved or immoral acts manifestly tending to the corruption of the morals of youth ..."

The Court did not reach the basic issue of the constitutionality of the obscenity regulation in question in the Michigan law. Instead, Mr. Justice Frankfurter, for the unanimous court, held that the statute was unconstitutional because it curtailed the freedom of adults while attempting to protect only children. The Court in this instance said:

> "We have before us legislation not reasonably restricted to the evils with which it is said to deal. The incident of this enactment is to reduce the adult population of Michigan to read only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the due process clause of the Fourteenth Amendment, and history has attested as the indispensable conditions for the maintenance and progress of a free society."

This rule by the state could justify the regulations of material merely because it might be harmful if circulated to children and served to emphasize the importance of determining whether the Constitution provides a foundation for a broader regulation of salacious material. The Court finally reached the underlaying constitutional issue in 1957

when it decided *Roth v. United States* and a companion case from the State of California entitled *Alberts v. California*. Both cases cited *Roth v. United States, 354 U.S. 476* (1957). The *Roth* case involved an appeal from a conviction for violation of the basic federal obscenity statutes, 18 U.S. Code, Section 1461. *Alberts* involved a conviction under the California General Obscenity Statutes. The attorneys in both cases in order to focus primarily on the underlying constitutional question conceded for the sake of the case that the material in question was in fact obscene, thus was set for an unencumbered discussion of the *First Amendment* and obscenity regulation in both the federal and state context.

The Court in this very bold step held that the *First Amendment* and *Fourteenth Amendment* under the guise of freedom of speech did not protect conceivably obscene speech and that the same was unworth of *First Amendment* protection, and that no balancing of harm or showing of clear and present danger was required to justify regulation by governmental authority of obscenity and dissemination thereof since it was utterly worthless. The *Roth* case dealt only with commercial dissemination, and the Court was careful to point out in its opinion that the door barring federal and state encroachment into the area of *First Amendment* rights should be kept tightly closed and opened only the slightest crack to prevent intrusion upon more important interests.

The major premises on which the Court's reasoning in *Roth* was predicated were, first: the existence of libel and blasphemy laws at the time when the *First Amendment* was adopted and established the fact that:

> "The unconditional phrasing of the First Amendment was not intended to protect every utterance."

and second:

> "This Court has always assumed that obscenity is not protected by the freedoms of speech and press."

During the years that followed the *Roth* case, the Court had an opportunity to further consider the issue of obscenity and very often would summarily reverse the conviction or the finding of obscenity by state or federal courts on the factual concept that the material before it could not be said to be obscene in the legal sense and would cite in support of their position their decision of *Roth v. United States*. From time to time, various other cases came before the Court which dealt with the governmental power to censor through massive use of the United States mail. See *Manual Enterprises, Inc. v. Day, 370 U.S. 478*. In the *Manual Enterprises* case the Supreme Court criticized and ruled unconstitutional an attempt by the Post Office to regulate obscene material.

It would be time-consuming and fruitless to detail each and every case that has appeared before the Court after that time, but it is significant to note a trend developed which found fruition in 1967 in the cases of *Redrup v. New York, 366 U.S. 767*. For the first time, it became relatively clear what the Court meant when in *Roth* it made the reference to need to prevent erosion in the *First Amendment* rights by Congress or by the state to permit intrusion or encroachment only when necessary to prevent encroachment upon more important interests, when the Court in its *per curiam* opinion held the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down a

suggested criteria for balancing the determination of whether material could be said to be obscene with the emphasis on the manner of dissemination rather than on the object of dissemination.

The Court in essence suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of pandering which the Court had seen significant in the case of *Ginzburg v. United States*, that no obscenity conviction or suppression could follow. Thereafter, the Court has reversed some 28 cases representing a wide cross-section from both federal and state, inferior and appellate courts, involving both criminal and civil condemnations, and the Court in reversing these cases cited only as its authority *Redrup v. New York*, supra. Cases reversed were: *Austin v. Kentucky*, 386 U.S. 767; *Gent v. Arkansas*, 386 U.S. 767; *Ratner v. California*, 388 U.S. 442; *Cobert v. New York*, 388 U.S. 443; *Keney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Shepard v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449, U.S. 452 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 (1967); *Quantity of Books v. Kansas*, 388 U.S. 454; *Potomac News Co. v. United States*, 88 S. Ct. 23; *Connor v. City of Hammond*, 88 S. Ct. 234; *Chance v. California*, 88 S. Ct. 253; *I. M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur*

Management Corp. v. State of Tennessee, 38 U.S. 578 (1968); *Felton v. City of Pensacola, 390 U.S. 340* (1968); *Henry v. State of Louisiana, 20 L. Ed. 1343* (1968); *Carlos v. New York, 24 L. Ed. 303* (1969); *Cain v. Kentucky, 397 U.S. 319*. (1970); *Bloss v. Dykema, 398 U.S. 278* (1970); *Walker v. Ohio, 398 U.S. 434* (1970); *Hoyt, et al. v. State of Minnesota, 399 U.S. 524* (1970); *Childs v. Oregon, No. 786 Oct. Term 1970, 39 LW 3436* (Apr. 5, 1971); *Bloss v. Michigan, No. 1150, Oct. Term 1970, 39 LW 3478* (May 3, 1971).

Counsel herein has represented unto the Court its position with respect to what they feel is the true meaning of *Redrup*. To further give support to the proposition espoused heretofor, we should like to cite the verbage from several cases discussing the meaning of *Redrup* as it appeared to those courts.

(a) *Poulos v. Rucker, 288 F. Supp. 305* (1968), U.S.D.C., M.D. Alabama, N.D. Chief Judge Johnson of the U.S. District Court wrote about *Redrup* as follows:

> "In cases where the sole issue is obscenity, *vel non*, *Redrup v. State of New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515*, states the controlling legal principles. After outlining the diverse views of the individual justices, the Court held that 'whichever of these constitional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand.' *Redrup, supra at 771, 87 S. Ct. at 1416*. One month after *Redrup* the Court reversed *per curiam* 13 state and federal court judgments finding material obscene without waiting for briefs and arguments. The Court simply granted *certiorari* and reversed, citing *Redrup*. This Court interprets

these decisions as indicating that it is content, is not entitled to constitutional protection. The Ninth Circuit, *Grant v. United States, 380 F.2d 748,* and the Eighth Circuit, *Luros v. United States, 389 F.2d 200* (slip opinion dated Feb. 7, 1968), have also taken this view of the recent cases.

"This is not to say that the *First and Fourteenth Amendments* preclude all limitations on the distribution and sale of dirty, filty and sordid books. The Court in *Redrup* noted that:

> 'In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645;* cf. *Butler v. State of Michigan, 352 U.S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412.* In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. City of Alexandria, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 123; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 72 S. Ct. 813, 96 L. Ed. 1068.* And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31.' Redrup, supra, 386 U.S. at 769, 87 S. Ct. at 1415.*

"By clear implication, the presence of these issues would make a difference. The Supreme Court has recently reaffirmed its willingness to tolerate greater limitation when distribution to minors is involved. *Ginzburg v. State of New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195* (1968), upholds on its

face a New York criminal obscenity statute which prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them, whether or not it would be obscene to adults."

(b) *Luros v. U.S.A., 389 F.2d 200* (1968) CA-8.

"In *Redrup v. State of New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515* (1967), there is specific indication that a majority of the Supreme Court adopts standards 'not dissimilar' to banning only 'hard-core' pornography. Subsequent application of *Redrup* gives no contraindication."

(c) *State of Washington v. Cox, 477 P.2d 198* (1970), (Court of Appeals, State of Washington).

"Three years after *Jacobellis* the Supreme Court disposed of three appeals in a remarkable *per curiam* opinion. One of the three, *Redrup v. New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515* (1967), is strikingly similar in factual pattern to the case before us. The opinion first notes that:

> 'In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L.Ed. 645*; cf. *Butler v. Michigan, 352 U.S. 380, 77 S. Ct. 524, 1 L.Ed.2d 412*. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. Alexandria, 341 U.S. 622, 71 S. Ct. 920, 95 L.Ed. 1233; Public Utilities Comm'n v. Pollak, 343 U.S. 451, 72 S. Ct. 813, 96 L.Ed. 1068*. And in none was there evidence of the sort of

'pandering' which the Court found significant in *Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31.'*

"*Redrup v. New York, supra at 769, 87 S. Ct. at 1415.* In its opinion the court discusses the varying positions taken by the individual justices in the many cases considered subsequent to *Roth* and concludes that 'Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand.' *Redrup v. New York, supra at 771, 87 S. Ct. at 1416.* Specifically, the opinion holds that the distribution of the allegedly obscene publications in each of the cases is protected by the *First and Fourteenth Amendments* from governmental suppression, whether criminal or civil, in *personam* or in *rem.*

"*Redrup* is significant in that it reiterates the court's earlier suggestions that the various states consider enacting legislation prohibiting the distribution of obscene material to juveniles. It is also significant in holding that the sale of flagrantly sexual magazines by magazine and bookstores does not constitute an assault upon individual privacy, or pandering, as that term was defined in *Ginzburg v. United States, supra.*

"Following the decision in *Redrup*, the Supreme Court has reversed a substantial number of convictions without opinion, merely citing *Redrup* as the controlling authority.

". . . We will not speculate about the juridical future of obscenity other than to observe that a discernible conceptual rationale seems to be emerging. As we read *Redrup*, offensive, worthless, prurient material is not to be civilly suppressed or to be the essential element of a criminal conviction unless the material is

clearly 'hard-core' pornography or unless the accused possessor has conducted himself in a clearly proscribed manner."

(d) *Commonwealth of Pennsylvania v. Dell Publications, Inc., 233 A.2d 840* (1957), (Supreme Court of Pennsylvania).

"On May 8, 1967, without the fanfare of its 1966 trilogy, the Court handed down a cryptic *per curiam* opinion disposing of three consolidated cases, *Redrup v. State of New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L.Ed.2d 515*, which may yet prove to be the most significant of its obscenity opinions. The impact of this opinion, along with those cases summarily decided on the last day of the Term, comes as close to a holding that, in the eyes of the present Court, 'Candy' is not per se constitutionally obscene as is possible without a direct ruling on the book itself. Although the Court had originally granted review in *Redrup* to consider problems of scienter upon the assumption that the materials involved were obscene in the constitutional sense, it decided to dispose of the case upon the ground that they were not obscene under the *First and Fourteenth Amendments*. The Court noted that while it was badly split concerning the precise definition of obscenity, each of the seven justices who reached the merits agreed that under their individual approaches the materials were not legally obscene. Involved in the cases decided by *Redrup* were two paperbacks, 'Lust Pool' and 'Shame Agent', and ten so-called 'girlie' magazines such as 'High Heels', 'Gent' and 'Swank.'

"*Redrup* seems to signify the Court's final abandonment of its futile search for a definition of obscenity *vel non*. For significantly, instead of attempting to determine what constituted obscenity, the Court approached the problem in terms of those

circumstances under which the publication of otherwise unobjectionable material might be constitutionally restricted, *87 S. Ct. at 1415:*

> 'In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Commonwealth of Massachusetts, 32 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645;* cf. *Butler v. State of Michigan, 352 U.S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412.* In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. City of Alexandria, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 72 S. Ct. 813, 96 L. Ed. 1068.* And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31.'*

"As has already been indicated in this opinion, none of the three situations described in *Redrup* are present in the case at bar. The importance of *Redrup* to obscenity litigation in general, and to the instant case in particular, is amply demonstrated by eleven decisions handed down by the Court on the last day of the 1966 Term, June 12, 1967. In each case the Court granted *certiorari* and summarily reversed an obscenity conviction citing *Redrup* as its sold authority. In other words, none of the materials involved in these litigations was, in the Court's view, obscene in the constitutional sense. Thus *Redrup* suggests that the Court *en banc* and each of the individual judges have adopted an 'I know it when I see it' test for obscenity. Nevertheless, a glance at the type of books held to be protected under *Redrup's*

aegis clearly demonstrates the divergence between the Supreme Court's utilization of a subjective analysis and that indulged in by the court below. . . "

"We can only conclude therefore that under both *Redrup* and the *Roth-Memoirs* test the court below erred in finding 'Candy' constitutionally obscene."

(e) *In Rem Seven Magazines, 268 A.2d 707* (1970), (Supreme Court, Rhode Island).

"The *Roth-Memoirs* ground rules have by no means solved the problems which have come before the courts, and a reading of the cases makes it obvious that judges have been troubled in applying those guidelines to the materials which have been before them for adjudication. Apparently not even the Supreme Court was satisfied that its prior pronouncements were adequate to solve the recurring conflict between the *First Amendment* guarantees on the one hand and the power of the states to suppress the sale and distribution of books and magazines on the other. What other explanation can there be for *Redrup v. New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L.Ed.2d, 515* (1967)? There, in a *per curiam* opinion subscribed to by seven of the Justices, the Court reversed three lower court determinations of obscenity. Instead of relying solely on the *Roth-Memoirs* standard as the yardstick by which to guage what was obscene, the Justices summarized their diverse views about what publications are protected from governmental suppression, whether criminal or civil, *in personam* or *in rem*. Then, in resolving the litigation before it, the Court held that 'Whichever of these constitutional views is brought to bear upon the cases before us; it is clear that the judgments cannot stand'."

(f) *U.S.A. v. 4,400 Copies of Magazines, 276 F. Supp. 902*, (1967), D.C. Maryland.

> "It appears, therefore, that persons to whom the magazines will be offered commercially, and the methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the *First Amendment*.
>
> "Since the magazines involved in the present case have not yet been admitted into the United States, we cannot be sure how they will be marketed—(a) whether they will be sold to juveniles, either by mail solicitation or over the counter, (b) whether they will be offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, and (c) whether they will be offered for sale in a manner which will amount to pandering.
>
> "This Court is, therefore, of the opinion that it cannot order the condemnation and forfeiture of these magazines at this time. On the other hand, this Court is of the opinion that if the magazines involved in this case are sold to juveniles, or are offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or if they are offered for sale in a manner which amounts to pandering, within the principles stated in *Ginzburg v. United States, 383 U.S. 463 at 465, 467, 470, 474, 476, 86 S. Ct. 942, 16 L. Ed. 2d 31*, they would not be entitled to the protection of the *First Amendment*."

(g) *U.S.A. v. 127,295 Copies of Magazines, 295 F. Supp. 1186*, (1968), (D.C. Maryland).

"It is incredible that those who adopted the *First Amendment* intended that it should license purveyors of filth to flood the country with the kind of material now held protected. But the duty of the inferior federal courts is to apply, as best we can, the standards the Supreme Court has decreed with respect to obscenity. The task is difficult because, to us, as to most judges, the test which must be applied here, like the Peace of God, passeth all understanding . . :

"It appears, therefore, that persons to whom the magazines will be offered commercially, and the methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the *First Amendment*.

"The government offered in this case circulars distributed by mail by a California company associated with the importer herein. These circulars, and the interior envelope in which they were contained, which advertise some of the same magazines issues involved in this case, make it highly probable that these magazines will be merchandized by a blatant appeal to prurient interest.

"Nevertheless, since the magazines involved in the present case have not yet been admitted into the United States, we cannot be sure how they will be marketed—(a) whether they will be sold to juveniles, either by mail solicitation or over the counter, (b) whether they will be offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, and (c) whether they will be offered for sale in a manner which will amount to pandering.

"This Court is, therefore, of the opinion that it cannot order the condemnation and forfeiture of

these magazines at this time. On the other hand, this Court is of the opinion that if the magazines involved in this case are sold to juveniles, or are offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or if they are offered for sale in a manner which amounts to pandering, within the principles stated in *Ginzburg v. United States, 383 U.S. 463, at 465-466, 467, 470-471, 474-475, 86 S. Ct. 942, 16 L. Ed. 2d 31,* they would not be entitled to the protection of the *First Amendment.*"

(h) *Commonwealth of Massachusetts v. Palladino, 260 N.E. 2d 653,* (1970), (Supreme Judicial Court of Massachusetts).

"While the insufficiency of the complaints is dispositive of the case, we think it appropriate to point out that the recent decisions of the Supreme Court in *Redrup v. New York, 386 U.S. 767; 87 S. Ct. 1414, 18 L. Ed. 2d 515; Central Magazine Sales, Ltd. v. United States, 389 U.S. 50, 88 S. Ct. 235, 19 L.Ed.2d 49; Schackman v. California, 388 U.S. 454, 87 S.Ct. 2107, 18 L.Ed.2d 1316;* and *Bloss v. Dykema,* (June 2, 1970), *398 U.S. 278, 90 S. Ct. 1727, 26 L.Ed.2d 230* (see *Hunt v. Keriakos* (June 19, 1970), *428 F.2d 606* (1st Cir.), extend the protection of the *First Amendment to publications and films which, although depicting male and female nudity in sexually provacative poses, do not portray actual sexual congress or other activities commonly known as hard-core pornography.*"

(i) *State of Delaware v. Katz, 274 A.2d 448,* (1970), (Superior Court of Delaware).

"This decision is based upon the Supreme Court decision in *Redrup v. New York, 386 U.S. 767, 87 S.*

Ct. 1414, 18 L.Ed.2d 515 (1967), and its progeny. This Court is not sure under these recent cases what if anything is to be considered the 'hard-core' pornography which Mr. Justice Stewart feels you will know when you see it. It is apparently only that type of obscenity which has no protection under the *First Amendment*. And since *Redrup, supra*, and the line of cases based upon that decision, it is likely that even the worst hard-core pornography would be entitled to protection unless it was pandered. *Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31* (1966), sold to children, *Ginzburg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195* (1968), or sold in such a way that it was thrust upon people who could not avoid being exposed to it, *Redrup, supra*.

"This Court may not know what kind of material would be so hard core as to be deprived of constitutional protection, but it does know that materials far worse than the girly magazines at issue here have been held by the Supreme Court to be constitutionally protected. In the whole line of decisions cited in footnote 2 the Supreme Court has seemed to act as a censor reviewing the materials and deciding, presumably under the test of *Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1408* (1957), whether or not they were protected. In so doing the Court has identified certain things which are not legally obscene. On the basis of those decisions and not finding any of the factors mentioned in *Redrup, supra*, to be present, this Court is bound to hold that these magazines are entitled to constitutional protection."

(j) *Pinkus v. Pitchess, 429 F.2d 416, CA-9*. Affirmed. Sub nom. *California v. Pinkus, 400 U.S. 922* (1970).

"The district judge, as did the state court jury, made the factual determination that the film was obscene, but we have concluded that we cannot reconcile the determination with Supreme Court decisions in several cases involving comparable material. See, e.g., *Bloss v. Dykema, 398 U.S. 278, 90 S. Ct. 1727, 26 L.Ed. 2d 230* (1970); *Redrup v. New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L.Ed.2d 815* (1967)."

(k) *Spindr v. United States, 440 F.2d 1241* (CA-8, 1971).

"We are bound of course by the law of obscenity as declared by the United States Supreme Court. It is our considered opinion that the materials involved in this case cannot be distinguished in any meaningful way from that material held not obscene in recent Supreme Court decisions. *Keriakos v. Hunt, 400 U.S. 929, 91 S.Ct. 185, 27 L.Ed.2d 189* (1970), denying cert. in *428 F.2d 606* (CA-1, 1970)."

4. To allow a local law enforcement officer to testify as an expert on the presence of absence of the elements of obscenity solely because of his position denies Petitioner Due Process of Law and Equal Protection of the Law.

The only evidence introduced at Petitioner's trial on the obscenity of the publications involved were the publications themselves ("girlie" magazines not depicting sexual intercourse), and the testimony of two police officers, one of whom was the local Chief of Police. A continuing objection was made by Petitioner's trial counsel to testimony by the police officers on the ground that they had not been properly qualified to testify by opinion evidence on the elements of obscenity as they were present or absent in the publications involved.

The Trial Court overruled said objections, and, in regard to Chief Caldwell, stated that "the Chief of Police of a City of approximately 175,000 people and a county of over 200,000 people is certainly sufficient expert to testify on the subject as to community standards or national or state standards, as to what is obscene in a case like this."

The witness then was allowed to testify as to each element in the test of obscenity. He found both publications to satisfy all three requirements for a finding of obscenity.

It is so well settled that citations of authorities would be superfluous to show that only experts are allowed to give opinion evidence.

Mr. Justice Frankfurter, in his concurring opinion in *Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205*, had the following to say in a case in which defense experts were not allowed to testify:

> "... for community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patentability of a controverted device.

"There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States, 354 U.S. 476, 489, 1 L.Ed.2d 1498, 1509, 77 S. Ct. 1304,* it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.' Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859? The difference derives from a shift in community feeling regarding what is to be deemed prurient or not prurient, by reason of the effects attributable to this or that particular writing. Changes in the intellectual and moral climate of society, in part doubtless due to the views and findings of specialists, afford shifting foundations for the attribution. What may well have been consonant with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time.' United States v. Kennerley (DC NY) 209 F.119, 120. This was the view of Judge Learned Hand decades ago reflecting an atmosphere of propriety much closer to mid-Victorian days than is ours. Unless we disbelieve that the literary, psychological or moral standards of a community can

> be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was it was violative of 'due process' to exclude the constitutionally relevant evidence proffered in this case."

While ordinarily, the trial court determines the competency and qualifications of an expert witness, such determination will be reversed where based upon an error of law or the result of an abuse of discretion. *Jones, Evidence, 5th Ed.*, §414, and cases cited.

Under no conceivable stretch of the imagination can it be said that, merely by virtue of his position, a police officer or police chief, is competent to testify as to the psychological and physiological responses evokes in someone viewing a magazine, yet the officers in question blithely testified as to the "prurient" appeal of the publications. For the difficulties in this area, see *United States v. Klaw*,350 *F.2d 155* (1965). See also, *Duggan v. Guild Theatre, Inc., 258 A.2d 865* (1969), *Hudson v. United States, 234 A.2d 903* (1967), and *Woodruff v. State*, 273 A.2d 436 (1971).

The above cases reversed state court convictions because there was no competent evidence on which the jury could base a decision that the elements of obscenity were present, except the materials themselves.

In the case at bar, the situation is the same in that testimony of incompetent witnesses is tantamount to no evidence at all.

The offense not being proven by competent evidence, it is a denial of process of law and equal protection of the law to

convict where the material is not "hard-core pornography", not pandered, not sold to minors, and not disseminated in such a way as to intrude upon the sensibilities of persons unwilling to view it. See also, *Redrup v. New York, 386 U.S. 767* (1967).

CONCLUSION

It is respectfully submitted that the dismissal of the Petitioner's appeal under the circumstances hereinenumerated must be treated as a denial of due process of law, and this Court should treat said dismissal as a final judgment. Furthermore, the statute under which Petitioner was convicted is unconstitution, as written and as applied, to Petitioner and was held to be so by a three-judge court and is now pending review in the Supreme Court. The materials involved herein are not obscene and none of the factors mentioned in *Redrup* were present.

The conviction of the Petitioner on the basis of the testimony of incompetent witnesses denies due process and equal protection.

For the foregoing reasons, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Of Counsel

APPENDIX A

First, Fifth and Fourteenth Amendments, U.S.C. §847.011 of Florida Statutes

FIRST AMENDMENT, CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither

the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 847.011 of the Florida Statutes

(1)(a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise any any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, or whom, or by what means any, or what purports to

be any, such material, matter, article, or thing of such character can be purchased, obtained, or had; or who in any matter knowingly hires, employs, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars ($1,000.00), or both. A person who, after having been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding give years or in the county jail not exceeding one year or by fine not exceeding ten thousand dollar ($10,000.00), or by both such fine and imprisonment.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles, or things coming within the provisions of the foregoing subsection (a) is presumptive evidence of the violation of said subsection.

(2) A person who, knowingly has in his possession, custody, or control any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechnaical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use; or purporting to be for indecent or immoral use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or

by fine not exceeding five hundred dollars ($500.00), or both. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this section is guilty of a felony and shall by punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding ten thousand dollars ($10,000.00), or by both such fine and imprisonment.

(4) Every act, thing, or transaction forbidden by this act shall constitute a separate offense and shall be punishable as such.

(5) Proof that a defendant "knowingly" committed any act or engaged in any conduct referred to in this act may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

(6) There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this act, and upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer the same shall be delivered to and held by the clerk of the court having jurisdiction to try such violation. When the same is no longer required as evidence, the prosecuting officer or any claimant may move the court in writing for the disposition of the same and after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this act, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

(7) (a) The circuit court has jurisdiction to enjoin a threatened violation of this act upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such state attorney, county solicitor, or county prosecuting attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. Whenever the relator state attorney, county solicitor or county prosecuting attorney shall request a judge of said court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within three days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided,

however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state attorney or county solicitor or county prosecuting attorney before the issuance of a restraining order provided for by subsection (b) of this section, and there shall be no liability on the part of the state or the state attorney or the county solicitor or the county prosecuting attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this act, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(8) The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorneys, shall vigorously enforce this act within their respective jurisdictions.

(9) This act shall not apply to the exhibition of motion picture films permitted by Section 521.02, Florida Statutes.

(10) For the purposes of this act, the test of whether or not material is obscene is:

"Whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

(11) For the purposes of this act, the word "person" includes individuals, firms, associations, corporations, and all other groups and combinations. (Ch. 61-7)

APPENDIX B

Motion to Dismiss the Information

COMES NOW the Defendant, DENNIS GARY MONGER, moving that this Court dismiss the information in Case No. 70-613 and as grounds of motion says that the Defendant has been informed against for unlawfully selling two publications, to wit: "Body Shop" and "The Erotic Cinema". The facts are not in dispute because the Defendant admits that he sold the publications. The question of the obscenity vel non of the magazines has not been determined. The Defendant moves that this Court dismiss the information which alleges violation of Section 847.011, Florida Statutes, for the reason that the statute is unconstitutional and has been previously declared to be unconstitutional in Meyer v. Austin, 69-678-CIV-J, USDC, Mid. Dis. Fla., Jax. Div., July 22, 1970, which case is now being argued before the United States Supreme Court.

The other division of this Court, namely, The Honorable M. C. Blanchard, has already ruled in Case Nos. 70-607, 70-608, 70-119 and 70-120, that the statute is constitutional. The same brief presented in those cases is herewith attached for this division's review. The facts in both cases are the same except that in the MONGER case presently set for trial on Monday, November 2, 1970, there has been no prior judicial determination of obscenity. The brief in those cases is adopted as the brief to be submitted to this Court which is herewith attached.

The constitutionality of the nuisance statute has also been attached and briefs have been submitted. The County Solicitor however has advised that the nuisance count against the Defendant Morrison will not be tried.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by delivery to Carl H. Harper, County Solicitor, Court of Record Building, Pensacola, Florida, this 29th day of October, 1970.

/s/ Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida

APPENDIX C

Order Denying Motion to Dismiss the Information

THIS CAUSE coming on to be heard upon the Defendant's Motion to Dismiss the information on the grounds of the unconstitutionality of Section 847.011, Florida Statutes; and the Court having before it the voluminous brief submitted by the Defendant's counsel; and the Court being of the opinion that even though a three-judge federal court held in *Meyer v. Austin*, 69-678-CIV-J, USDC, Mid. Dis. Fla., Jax, Div., July 22, 1970, that Section 847.011, Florida Statutes, is unconstitutional.

And the Court being further advised that *Meyer v. Austin* has been appealed to the United States Supreme Court and is being vigorously opposed by the State of Florida and is soon scheduled for argument before the United States Supreme Court; and the Court being fully apprised in the premises, it is, therefore,

ORDERED AND ADJUDGED:

1. That this Court has jurisdiction to enter this order.

2. For the reasons stated above the Motion to Dismiss the information is denied.

3. This Court finds the Statute, Section 847.011, is constitutional and the Defendant shall forthwith proceed to trial on Monday, November 2, 1970. *State v. Reese*, 222 So. 2d 732.

DONE AND ORDERED in Chambers at Pensacola, Florida, this 30th day of October, 1970.

/s/ Kirke M. Beall
Judge

APPENDIX D

Notice of Criminal Appeal

DENNIS GARY MONGER, takes and enters his appeal to the District Court of Appeal, First District of Florida, to review the final judgment of the Court of Record for Escambia County, Florida, bearing the date of January 12, 1971, and entered and recorded in Minute Book 117 at Pages 419-420 on January 12, 1971. The nature of the final judgment appealed from is a judgment sentencing the Defendant Monger for the sale of two allegedly obscene publications entitled "Body Shop" and "The Erotic Cinema" in violation of Section 847.011, Florida Statutes, which trial was held on November 2, 1970, and sentence entered on January 12, 1971. All parties to the cause are called upon to take notice of the entry of this criminal appeal.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by delivery to Carl H. Harper, County Solicitor of Escambia County, Florida, Court of Record Building, Pensacola, Florida, this 12th day of January, 1971.

Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida

APPENDIX E

Motion for Supersedeas

Defendant, DENNIS GARY MONGER, shows unto this Court that he has appealed from the final judgment entered against him in the above styled cause on the 12th day of January, 1971, and that this Motion is made in good faith and not for the purpose of delay.

WHEREFORE, Defendant moves that this Court stay execution of the final judgment in this cause for a period of ten (10) days in order that the Defendant might procure a supersedeas bond provided for by law with respect to such appeals; and Defendant further moves that this Court fix the amount of bond.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by delivery to Carl H. Harper, County Solicitor of Escambia County, Florida, Court of Record Building, Pensacola, Florida, this 12th day of January, 1971.

Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida

APPENDIX F

Judgment and Sentence

On this January 12, 1971 came in person and by counsel, Paul Shimek, the defendant Dennis Gary Monger into open court for adjudication of guilt and imposition of sentence, same having been deferred November 2, 1970 for investigation by the Florida Parole Commission. Thereupon, the Court adjudged the defendant guilty of Unlawful sale of Obscene Magazine as charged under the first and second counts of the information.

It is the judgment of the Court and sentence of the law that you, Dennis Gary Monger, for your offense under the first and second count, forfeit and pay to the State of Florida for the use of Escambia County a fine of One Thousand ($1,000.00) Dollars under each count and in default of payment of said fines, by imprisoned by confinement at hard labor in the County Jail for a period of six (6) months under each count to run consecutively, and pay the cost of your prosecution assessed at One Hundred Fifty Dollars ($150.00) and in default of payment thereof, be imprisoned by confinement at hard labor in the County Jail for an additional thirty (30) days. The Court ordered defendant to pay Florida Police Academy cost of $1 under each count or 1 day additional confinement under each count. Thereupon, the defendant filed the following Notice of Appeal.

NOTICE OF CRIMINAL APPEAL

DENNIS GARY MONGER, takes and enters his appeal to the District Court of Appeal, First District of Florida, to review the final judgment of the Court of Record for Escambia County, Florida bearing the date of January 12, 1971, and entered and recorded in Minute Book 117 at Page 419 on January 12, 1971.

APPENDIX G

Assignments of Error

Defendant assigns and designates as error the following judicial acts in the lower court:

1. The court erred at trial on November 2, 1970, and prior to trial by declaring that § 847.011, Florida Statutes, after thorough briefing and argument, was constitutional.

2. The court erred in its order denying the Defendant's motion to dismiss the information on the grounds that § 847.011, Florida Statutes, was unconstitutional.

3. That the verdict and judgment is contrary to the law.

4. That the verdict and judgment is contrary to the evidence.

5. That the verdict and judgment is contrary to the law and the evidence.

6. The court erred in denying the Defendant's motion for a directed verdict of acquittal.

7. The court erred in permitting the case to go to the jury after it was clear that there was no evidence in a proper predicate laid of contemporary national community standards, prurient appeal to the average adult reader, and any redeeming social value.

8. The court failed to make a determination of obscenity on its own, as is constitutionally required, before it sent the case to the jury. The jury unjustly presumed the material obscene in the absence of the court's not passing on same.

APPENDIX H

Nunc Pro Tunc Order of Trial Court

THIS CAUSE having come on to be heard upon motion of the Court to modify sentence heretofore imposed, and the Court having previously on the date of sentence, January 12, 1971, imposed two one-year sentences to run consecutively with fines of $1,000.00, or six (6) months, and it appearing to the Court that the Court imposed said one-year sentences subsequent to the filing of Notice of Appeal by the Defendant, the Court is of the opinion that that portion of the sentence, namely, the two one-year sentences under each count respectively were beyond the jurisdiction of the Court, and the Court having considered the matter and being advised in the premises, it is, therefore,

ORDERED AND ADJUDGED that the two one-year sentences imposed herein be and the same are hereby rescinded and set aside leaving the two sentences under each count of $1,000.00 fine or six (6) months in the County Jail, and costs of $150.00 or 30 days, all to run consecutively remaining.

DONE AND ORDERED at Pensacola, Florida, this 18th day of January, 1971, Nunc Pro Tunc, January 12, 1971.

/s/ Kirke M. Beall
Judge

APPENDIX I

Order Transfering Case to Supreme Court of Florida

It appearing that the jurisdiction of this court has been improvidently invoked, it is therefore ordered pursuant to the provisions of Florida Appellate Rules, the notice of appeal and all other papers filed in this cause shall, after five (5) days from the date hereof, be transferred to the Supreme Court of Florida for consideration and determination; provided, in the meantime, attorneys of record for the parties, or any of them, do not being to the attention of this court that the cause is one which should be held and determined by this court.

WITNESS the Honorable Dewey M. Johnson, Chief Judge, and Seal of the Court this 7th day of April, A. D. 1971.

/s/ Raymond E. Rhodes
Clerk

APPENDIX J

Motion to Dismiss the Appeal

COMES NOW, The Appellee, State of Florida, by and through its undersigned counsel, and moves this Court for an order dismissing the instant appeal, and as grounds therefor states:

1. A notice of appeal filed before entry of judgment is a *brutum fulmen* and an appeal based thereon should be dismissed, e.g., *Gates v. Haynes*, 22 Fla. 325 (1886).

2. It is patently obvious that the notice of appeal in this case was filed prior to entry of either judgment or sentence (R. 277, 286, 276), in an apparent attempt to thwart the sentencing of appellant. (R. 282-3).

WHEREFORE, Appellee submits the appeal *sub judice* should be dismissed.

Respectfully submitted

ROBERT L. SHEVIN
Attorney General

RONALD W. SABO
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

Counsel for Appellee

APPENDIX K

Opinion of Supreme Court of Florida Dismissing the Appeal and Dissenting Opinion

Appellee's motion to dismiss is granted and it is ordered that the appeal be and the same is hereby dismissed.

CARLTON, ADKINS, McCAIN and DEKLE, JJ., concur

ROBERTS, C.J., and BOYD, J., dissent

ERVIN, J., dissents with opinion

ERVIN, J., dissenting:

I think it is altogether *too technical* to refuse to give credence to notices of appeals filed ante to judgments or sentences being reduced to writing and placed in a minute or judgment book after they have been pronounced in open court and reflected in the minutes. A person convicted should not be delayed in taking an appeal or commencing service of sentence. A notice of appeal is not necessarily invalid because it antedates a written judgment. It picks up when the judgment is entered unless the state can show some prejudice by early filing of the notice, which it can't in this case.

APPENDIX L

Petition for Rehearing

COMES NOW the Appellant, DENNIS GARY MONGER, by his undersigned attorney, petitioning this Court for a rehearing without assuming any new grounds or positions from that taken in the original briefs upon which this cause was submitted, and prays that this Court accept this appeal as a petition for writ of habeas corpus and grant the Appellant, DENNIS GARY MONGER, full appellate review on appropriate questions and as grounds therefor says as follows:

The date of the written court order is the same date of the appeal, namely, January 12, 1971, even though chronologically it was filed later through the medium of nunc pro tunc. The record reflects (R. 277) that immediately after the imposition of oral sentence, notice of criminal appeal was filed, which filing was absolutely necessary to preclude the anticipated arbitrary and capricious future court resentencing verbally or in writing. The record reflects that except for counsel's filing the written notice of appeal the Court would have successfully imposed a mandatory jail sentence. The conduct on the part of the trial judge indirectly frustrated the defendant's appeal and due process has been violated. The undersigned acknowledges the rule that a party is normally bound by the conduct of this attorney, but this rule should not be applied blindly where the result would be a clear denial of due process.

Since a habeas corpus proceeding is properly available to determine the constitutionality of the obscenity statute under which the petitioner is being held to account; and since the question before this court is the constitutionality vel non of the Florida obscenity statute and the obscenity vel non of the material in the constitutional sense; and since restraint (if the

statute is unconstitutional or if the material is not obscene) is as subversive of the right of the petitioner as if it were exercised by a person not clothed with authority; and since the guilt or innocence of the petitioner can no longer be an issue; then the undersigned submits that this appeal should be heared as a petition for habeas corpus. Although the appellant is presently free on bail he remains in constructive custody and should be entitled to obtain a writ of habeas corpus from this court to investigate the legality of the restraint upon him.

WHEREFORE, the undersigned prays that this petition for rehearing be heared on the question of the right of the appellant to seek full appellate review in this court by means of habeas corpus and that the notice of appeal and all papers and pleadings following be considered as a writ of habeas corpus to accomplish the review herein recited.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U. S. Mail to the Honorable Raymond E. Rhodes, Clerk of the First District Court of Appeal, Tallahassee, Florida; the Honorable Ernie Lee Magaha, Clerk of the Court of Record, Pensacola, Florida; the Honorable Kirke M. Beall, Judge of the Court of Record, Pensacola, Florida; the Honorable Ronald W. Sabo, Attorney General's Office, The Capitol, Tallahassee, Florida; on this 11th day of June, 1971.

Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida

APPENDIX M

Order Denying Rehearing

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY, TEST:

/s/ SID J. WHITE, Clerk Supreme Court

APPENDIX N

Information

IN THE COURT OF RECORD OF
ESCAMBIA COUNTY, FLORIDA

At the Winter Term thereof 1970

Carl H. Harper, County Solicitor of Escambia County, Florida, prosecuting for the STATE OF FLORIDA, in said County, in the name and by the authority of the State of Florida, charges that DENNIS GARY MONGER on the 28th day of March in the Year of Our Lord, One Thousand, Nine Hundred and Seventy at and in Escambia County, Florida, at about 4:55 P.M., at the Amusement Arcade News-stand, 194 North Palafox Street, Pensacola, Escambia County, Florida, did unlawfully and knowingly sell to Robert Griffin an obscene, lewd, lascivious, filthy or indecent magazine, to-wit: "Body Shop", which magazine contains numerous photographs of nude men and women posed separately and together in such a manner, so as to allow the unimpeded view of the camera to the genitals of each, and which magazine, to the average person applying contemporary community standards, the dominant theme of which taken as a whole, appeals to prurient interest in sex, having utterly no redeeming social value and going substantially beyond the customary limits of candor in the descriptions or representations of sex or sexual matters, contrary to the provisions of Section 847.011, Florida Statutes.

A SECOND COUNT: And your informant aforesaid, prosecuting as aforesaid, on his oath aforesaid, further information makes, that Dennis Gary Monger, at about 4 P.M., on March 29, 1970, at the Amusement Arcade News-Stand, 194 North Palafox Street, Pensacola, Escambia

County, Florida, did unlawfully and knowingly sell to Robert Griffin an obscene, lewd, lascivious, filthy or indecent magazine, to-wit: "The Erotic Cinema", which magazine contains numerous photographs of nude men and women posed separately and together in such a manner so as to allow the unimpeded view of the camera to the genitals of each, and which magazine, to the average person applying contemporary community standards, the dominant theme of which takens as a whole, appeals to prurient interest in sex, having utterly no redeeming social value and going substantially beyond the customary limits of candor in the descriptions or representations of sex or sexual matters, contrary to the provisions of Section 847.011, Florida Statutes.

/s/ Carl H. Harper,
County Solicitor of
Escambia County, Florida

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 19 1972
E. ROBERT SEAVER, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-486

DENNIS GARY MONGER,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT L. SHEVIN
Attorney General

MICHAEL M. CORIN
Assistant
Attorney General

The Capitol
Tallahassee, Florida
32304
COUNSEL FOR RESPONDENT

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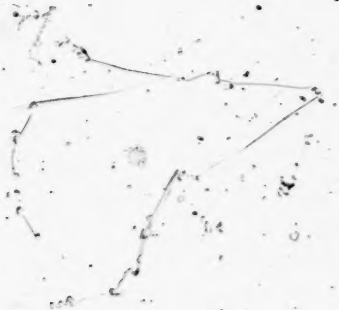
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-486

DENNIS GARY MONGER,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

On April 1, 1970, petitioner was charged by information with two counts of having violated Florida's obscenity statute (Petitioner's Appendix N). Petitioner received a jury trial on both counts. The jury returned guilty verdicts as to both counts on November 3, 1970 (Petitioner's Brief, page 5).

On January 12, 1971, petitioner was adjudged guilty on both counts and was sentenced accordingly (Petitioner's Appendix F). However, prior to the entry of judgment, petitioner filed a notice of appeal. The notice of appeal was directed to the District Court of Appeal of Florida,

First District (Petitioner's Appendix D). On March 18, 1971, petitioner filed a motion for order transferring case to Florida Supreme Court, it appearing that in lieu of the constitutional attack on Section 847.011, Florida Statutes, the jurisdiction of the First District Court of Appeal had been improvidently invoked. On April 7, 1971, the First District Court of Appeal entered an order transferring the cause to the Florida Supreme Court for consideration and determination (Petitioner's Appendix I).

Subsequent to the transferal of the cause to the Florida Supreme Court, the State of Florida filed a motion to dismiss based on the fact that the notice of appeal had been filed prior to the entry of either judgment or sentence (Petitioner's Appendix J). The Florida Supreme Court granted the state's motion to dismiss (Petitioner's Appendix K). Petitioner filed a petition for rehearing in the Florida Supreme Court on June 11, 1971, and the Florida Supreme Court denied this petition on July 6, 1971 (Petitioner's Appendices L and M; Petitioner's Brief, page 10).

QUESTION PRESENTED

WHETHER THE JURISDICTION OF THIS COURT HAS BEEN PROPERLY INVOKED PURSUANT TO 28 U.S.C.A. § 1257(3)?

ARGUMENT

Petitioner has attempted to invoke the jurisdiction of this Court pursuant to 28 U.S.C.A. § 1257, which provides in part applicable herein as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

Respondent submits that the order of the Florida Supreme Court granting the state's motion to dismiss in this cause below is not such "final judgment or decree" rendered by the highest court of a state in which a decision could be had within the meaning of 28 U.S.C.A. § 1257. The only judgment or decision which the Florida Supreme Court rendered in this cause was the decision that the Florida Supreme Court lacked jurisdiction to determine the merits of the appeal. In determining that they had no jurisdiction, the Florida Supreme Court did not reach any federal question which might have been involved in the cause nor did it deny petitioner any federal right properly presented for review. Its decision was simply based on the valid non-federal ground that it lacked jurisdiction in the cause. Callendar et al. v. State, 181 So.2d 529 (Fla. 1966).

In accordance with prior statutes and now according to the Rules of Criminal and Appellate Procedure, promulgated under the authority of the Florida Constitution, Article V, Section 3, the Florida Supreme Court has consistently held:

> "[I]t is clear that the judgment is not rendered for the purpose of an appeal unless it is rendered 'in open court and in writing, signed by the judge and filed' as required by Rule 1.670, Cr.P.R."

Ell-Gee, Inc. v. Swann, 250 So.2d 850 (Fla. 1971). See also: State ex rel Faircloth v. Cross, 238 So.2d 81 (Fla. 1970), and Wells et al v. State, 38 So.2d 464 (Fla. 1949).

The rationale is found in the common sense proposition that until the judgment or sentence or judgment alone is entered and recorded against a defendant there exists nothing to appeal from, and that to accept appellate jurisdiction prior to the entry of a judgment and sentence or judgment would deprive the trial court of jurisdiction to impose same, thus thwarting the administration of justice through orderly adjudication, sentencing and appellate procedure.

It has been the uniform position of this Court to rely on the authority of the Florida Supreme Court to determine its jurisdiction and the jurisdiction of every other Florida court. Dresner et al v. Tallahassee, 375 U.S. 136, 11 L.Ed.2d 208, 84 S.Ct. 235 (1963), 378 U.S. 539, 12 L.Ed.2d 1018, 84 S.Ct. 1895 (1964) and Callendar et al v. Florida, 380 U.S. 519, 14 L.Ed.2d 265, 85 S.Ct. 1325 (1965) 383 U.S. 270, 15 L.Ed.2d 749, 86 S.Ct. 924 (1966). This is based on the long-standing rule respected by all courts when the jurisdiction of a sister court is involved.

"As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat., § 709; Judicial Code, § 237. Certainly no Federal right was denied by that court, and if, we was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision."

* * * * *

"Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case

turns entirely upon questions of local or general law. . . ." John v. Paullin, 231 U.S. 583 (1913) at page 585. See also: Wolfe v. North Carolina, 364 U.S. 177, 4 L.Ed.2d 1650, 80 S.Ct. 1482 (1960).

Petitioner urges that the dismissal of his appeal by the Florida Supreme Court "does not comport with civilized notions of justice and is fundamentally unfair and violative of the due process clause." The following cases are cited for authority: Burns v. Ohio, 360 U.S. 252, 3 L.Ed.2d 1209, 79 S.Ct. 1164 (1959); Cochran v. Kansas, 316 U.S. 255, 86 L.Ed. 1453, 62 S.Ct. 1068 (1942); Dowd v. Cook, 340 U.S. 206, 95 L.Ed. 215, 71 S.Ct. 262 (1951) and Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971). All of these cases are materially distinguishable from the issue raised herein.

Burns v. Ohio, supra, stands for the proposition that a state may not constitutionally require an indigent criminal defendant to pay a filing fee before permitting him to file a motion for leave to appeal to one of its courts. Cochran and Dowd, supra, both involved the equal protection clause of the Fourteenth Amendment when it was claimed that the states involved in these cases, through penal officers, had denied the defendants therein

access to appellate proceedings through suppression of appeal documents or through the enforcement of prison regulations which did not allow the defendants to send out appeal papers until the time for appeal had expired. Boddie v. Connecticut, supra, dealt with welfare recipients who challenged certain state procedures for the commencement of litigation, including requirements for payment of court fees and costs for service of process, which had the effect of restricting the welfare recipients access to the courts in their attempts to bring actions for divorce. The Court, through Mr. Justice Harlan, held:

> ". . . Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 28 L.Ed.2d at 122.

One additional comment must be made about petitioner's reliance on Boddie v. Connecticut. On page 13 of petitioner's brief, he has attributed to this Court th following comment:

> "Furthermore, the Court summed up the Concepts involved in due process as follows:

> 'In the case at bar, Petitioner will have no hearing on the substantial federal questions, decided adversely to him, raised by his conviction for selling obscene magazines, unless the dismissal of his appeal is treated as a final judgment. Not to do so would sustain the State of Florida's denial to Petitioner of his right to appeal where there is not sufficient countervailing justification for the State's action. Boddie v. Connecticut, supra, at 377."

Respondent has gone through the Boddie opinion with a diligence nigh unto fanaticism and has been utterly unable to find such a remark made by this Court. Assuming arguendo that the Boddie decision is of some due process benefit to petitioner, reliance by him on the above-quoted comment attributed to this Court is clearly misplaced.

Respondent would suggest that it was the actions of petitioner through counsel which led to his present dilemma. The State of Florida through its Constitution and the Rules of Court enacted pursuant thereto and through state judicial construction of said rules has established an orderly and non-discriminatory procedure for perfecting appeals within its appellate court system. The system is designed and maintained to afford each and every defendant his right to due

process of law in a manner consistent with the orderly administration of justice. The state has a valid interest in protecting the rights of all its citizens, and, in so doing, Florida has attempted to avoid chaotic and haphazard appellate proceedings. Indeed, the Boddie opinion recognized this very concept:

> "Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a 'legal system,' social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the 'state of nature.'" 28 L.Ed.2d at 117

Respondent is cognizant of the fact that the petitioner has raised additional points for review in his brief, but since those issues were not properly presented to the Florida Supreme Court for appellate review, and disposed of, the additional issues are not now properly before this Court.

> ". . . . Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when

> rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting." Newman v. Gates, 204 U.S. 89 (1907) at page 95.

In the unlikely event this Court concludes for purposes of due process or for any other reason that the Florida Supreme Court erroneously declined to take jurisdiction in this cause or that the Florida Appellate Rules in accordance with the Florida Constitution are invalid, or that the dismissal of the appeal by the Florida Supreme Court constituted a "final judgment or decree" within the meaning of 28 U.S.C.A. § 1257, respondent will be more than willing to argue the additional issues raised by the petitioner, at the appropriate time and in the appropriate forum.

CONCLUSION

For the reasons and authorities herein expressed, the writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

MICHAEL M. CORIN
Assistant
Attorney General

The Capitol
Tallahassee, Florida
32304

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

This is to certify that three copies of the foregoing Brief of Respondent has been furnished petitioner's counsel, Honorable Robert Eugene Smith, Suite 507, The Alex. Brown & Sons Building, Towson, Maryland, 21204; Honorable D. Freeman Hutton, Suite 2005, 1175 Peachtree Street, N.E., Atlanta, Georgia, 30309 and Honorable Paul Shimek, Jr., 517 North Baylen Street, Pensacola, Florida, 32502, by Mail, this _____ day of January, 1972.

MICHAEL M. CORIN
Assistant
Attorney General

OF COUNSEL FOR RESPONDENT